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IN THE

Supreme Court of the United States

October Term, 1965
No. 991

PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

JURISDICTIONAL STATEMENT.

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IN THE

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PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles entered on September 17, 1965, in which said court affirmed the judgment of the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California entered on April 8, 1965. The Appellate Department of the Superior Court of the State of California for the County of Los Angeles is the highest state court in which a decision could be had.[1]

[1]Rule 63, California Rules of Court, WEST'S ANNOTATED CALIFORNIA CODES, Vol. 23, Part 1. The Appellate Department of the Superior Court refused to certify the present

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

Opinion Below.

No written opinion was rendered by either the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, or the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Jurisdiction.

This is an appeal from a conviction arising under California Penal Code section 650½. On April 8, 1965, a judgment of conviction was entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California.

On September 17, 1965, the Appellate Department of the Superior Court of the State of California entered an order affirming the judgment of the Municipal Court of Pasadena Judicial District, County of Los Angeles, State of California.

On September 28, 1965, the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles entered an order denying appellant's petition for rehearing or, in the alternative, for certification of cause to the District Court of Appeal.

On December 13, 1965, appellant filed in the Appellate Department of the Superior Court of the State

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case for hearing to the District Court of Appeal, which it had the power to do under this particular rule.

of California for the County of Los Angeles his Notice of Appeal to this Court.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decision sustains the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Adamson v. California*, 332 U.S. 46, 48 (1947).

Statute Involved.

California Penal Code section 650½, as pertinent to this case, provides as follows:[2]

> "A person who wilfully and wrongfully commits any act . . . which seriously disturbs or endangers the public peace or health or which openly outrages public decency . . . for which no other punishment is expressly provided by this Code, is guilty of a misdemeanor."

Question Presented.

Whether appellant's conviction of the violation of California Penal Code Section 650½ is void because said penal provision on its face and as applied to appellant is so vague and indefinite that the penalty prescribed for its violation constitutes a denial of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

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[2]The full text of California Penal Code section 650½ is provided in Appendix A hereof.

Statement of Case.

Appellant was charged in two separate complaints with two counts in violation of California Penal Code, Section 650½ and two counts in violation of California Penal Code, Section 314(1) (indecent exposure). Specifically, as to the violations of Penal Code Section 650½, the complaints charged that on or about a particular day, the appellant did wilfully and unlawfully and wrongfully commit an act which seriously disturbed and endangered the public peace and health and which openly outraged public decency in violation of the aforementioned section of the Penal Code.[3]

After trial by court on a plea of not guilty, appellant was found guilty of two violations of California Penal Code Section 650½ and found not guilty on the indecent exposure counts.

The facts are undisputed, as the evidence presented on trial consisted solely of three police reports admitted into evidence by stipulation.[4] In the main, the reports alleged three female patients had complained of seductive acts by appellant, a dentist, during the course of treatment.[5] Appellant at all times remained fully clothed, and none of the women made any complaint to appellant when the incidents occurred.

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[3]The full text of the original and amended complaint in Case No. M69629 and the original complaint in Case No. M69946 have been made a part of the Clerk's Transcript.

[4]The full text of each of these police reports is contained in the Settled Statement on Appeal, which has been made a part of the Clerk's Transcript.

[5]Although the police reports contained complaints by three female patients, the appellant was convicted of activities concerning only two of them.

How the Federal Question Is Presented.

At all stages of the proceedings, appellant continually and constantly attacked Penal Code Section 650½ as being unconstitutionally vague. Before entering a plea in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, appellant opposed both complaints on the ground, among others, that Penal Code Section 650½ was unconstitutionally vague.[6] His objections were overruled without written opinion.

Additionally, the question of the vagueness of Penal Code Section 650½ was raised at all stages of the appeal to the Appellate Department of the Superior Court for the County of Los Angeles, State of California. In all instances, appellant's argument was rejected without written opinion.

The Question Presented Is Substantial.

In *Musser v. Utah,* 333 U.S. 95 (1947), this Court held that a substantial federal question was raised by a state statute making it a crime to conspire:

> "To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or due administration of the laws."

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[6]The constitutional objections of appellant before trial are contained in his Demurrer to Amended Complaint, Memorandum of Points and Authorities in Support of Demurrer and in Opposition to Motion to Consolidate, and Supplemental Memorandum of Points and Authorities, all of which have been included in the Clerk's Transcript.

The Court noted the broadness of the statutory language and said:

> "Standing by itself, it would seem to be a warrant for conviction for agreement to do almost any act which a judge or a jury might find at that moment contrary to his or its notions of what was good health, morals, trade, commerce, justice or order." 333 U.S. at 97.

On remand, the Utah Supreme Court, which had not previously passed upon the precise question, struck down the statute as violating the Fourteenth Amendment because of vagueness and uncertainty.[7]

Recently, in *Graccio v. Pennsylvania,* 34 LAW WEEK 4099 (1966), this Court stated:

> "It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as *'misconduct'* or *'reprehensible conduct.'* If used in a statute . . . such loose and unlimiting terms would certainly fail to measure up to the requirements of the Due Process Clause." (Emphasis added.)

1. In the case at bar, the appellant has been charged with violating those provisions of California Penal Code Section 650½ which prohibit the doing of an act "which seriously disturbs or endangers the public peace or health, or which openly outrages public decency."[8] It is submitted that this language of California Penal Code Section 650½ is nothing less than a license to con-

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[7] *State v. Musser,* 118 Utah 537, 223 P. 2d 193 (1950).

[8] Original and amended complaint, Case No. M69629; the original complaint, Case No. M69946.

vict when the trier of fact does not approve of a defendant's conduct. The statute gives no fair warning of what is prohibited or proscribed.[9] Rather, the statute allows conviction in the unguided discretion of arresting officers, judges and juries.[10] There are no guideposts whatsoever as to what specific conduct may be deemed to seriously disturb and endanger the public peace and health, or as to what type of conduct will openly outrage public decency.

2. This is not a situation in which the broad language of the statute has been limited by judicial determination. There are no California cases which by judicial construction narrow or restrict the language of Penal Code Section 650½. On the contrary, the statute is intended to operate as a catch-all, for in the statute's final clause, it is provided that the acts therein condemned shall be misdemeanors provided only that the conduct involved is not somewhere else specifically punishable under the Penal Code.[11] Therefore, from the language of the statute itself, it becomes clear that the obvious purpose of the statute is to punish any unacceptable behavior which is not otherwise specifically

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[9] *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

[10] *Shuttlesworth v. Birmingham*, 15 L. Ed. 2d 176 (1965).

[11] See *People v. Proctor*, 46 Cal. 2d 481, 296 P. 2d 821 (1956). One other California case construing the statute follows the *Proctor* case in holding that a defendant cannot be convicted under section 650½ if his conduct violates some other provision of the California Penal Code. *People v. Hunter*, 208 Cal. App. 2d 633, 25 Cal. Rptr. 492 (1962). Dicta in *People v. Hensel*, 233 Cal. App. 2d 834, 43 Cal. Rptr. 865 (1965), that section 650½ involves "the element of publicity." But appellant's argument in the courts below that since the acts charged took place in the privacy of a dental office, he had not outraged "public" decency were rejected. There are no other reported California cases construing the language in section 650½ under which appellant was convicted.

prohibited by the California Penal Code. Thus, any behavior, no matter in what sphere, if slightly extraordinary, unusual, different or deviant, is rendered criminal if found to be distasteful to the trier of fact. The situation is closely analogous to the unfettered authority granted to juries in the statute struck down in *Graccio v. Pennsylvania,* 34 LAW WEEK 4099 (1966). The vagueness of the catch-all statute involved in this case is much more serious than that in *Graccio.* There, the unfettered decision of a jury that the defendant had done something reprehensible resulted only in a judgment for costs; here, the same kind of decision results in criminal conviction. Moreover, it is the kind of criminal conviction which may have the most serious consequences. Appellant earns his livelihood as a dentist. If this conviction stands, he will be subject to proceedings to revoke his license on the ground that he has been convicted of a crime involving moral turpitude.[12]

3. The catch-all use of this statute is made patently clear in the case at bar. In the field of sexual behavior, the California legislature, because of its broad consideration of the subject, has been held to have preempted the field, and thus, local governments may not regulate sexual behavior.[13] Despite such broad legislative consideration, the alleged acts of appellant do not run afoul of any specific California criminal statute dealing with sexual behavior. Indeed, as to the specific charges against this appellant, namely, violation of California Penal Code Section 314(1) (indecent exposure), the appellant was found not guilty.[14] Nonetheless,

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[12]California Business and Professions Code, Section 1679.

[13]*In re Carole Lane,* 58 Cal. 2d 99, 22 Cal. Rptr. 857 (1962).

[14]See original and amended complaint, Case No. M69629, and original complaint, M69946, which are a part of the Clerk's Transcript.

though there was no violation of any specific penal provision, this appellant, as does every California defendant charged under Section 650½, finds himself in a situation where his conduct, though not specifically criminal, is nonetheless subject to an obscure moral review by the trier of fact.

4. The validity of the statute has considerable importance beyond this case. The number of Californians being convicted for violations of Penal Code Section 650½ is indeed alarming. Though no statistics are kept for such misdemeanor offenses, counsel for appellant have personally checked the records of the 110 North Grand Avenue branch of the Los Angeles Municipal Court (one of twenty-three municipal courts in Los Angeles County) for the month of November, 1965 and have found that 76 complaints were filed alleging violation of Section 650½ of the Penal Code. In these 76 cases there were: 55 convictions to date under Section 650½; 11 complaints still pending trial; 9 complaints resulting in convictions under another section of the Penal Code; 1 complaint dismissed in the interests of Justice.[15] Additionally, not only are Californians faced daily with such vague and uncertain laws, but so, also, are the citizens of South Dakota, North Dakota, Oklahoma and New York.[16] By contrast, the citizens of

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[15]The records checked for the complaints filed were from the original Index for November, 1965 for this courthouse alone. In addition to this Index, 26 other indices are kept at other municipal courts throughout the Los Angeles area.

[16]The statutes of these four states are reproduced in Appendices B, C, D and E, respectively. In Oklahoma and New York, the statutory language has been somewhat qualified by judicial decision. As to Oklahoma, see *Gunn v. Territory*, 19 Okla. 240, 91 Pac. 861 (1907); *Rachel v. State* and *Vinson v. State*, 71 Okla. Cr. Rep. 33, 107 P. 2d 813 (1940). As to New York, see *People*

Utah and those of Indiana have been relieved from the threats of such omnipotent legislation in that the Supreme Courts of those states have held that statutes comparable to California Penal Code Section 650½ are void for vagueness.[17]

5. The federal question presented by this appeal is substantial and requires the plenary consideration of this Court for several reasons. First, the courts below have upheld the kind of catch-all criminal statute outlawed, under the Due Process Clause of the Fourteenth Amendment, by decisions of this Court in the *Musser* and *Graccio* cases. Second, the statute involved not only affects thousands of Californians each year, but the citizens of other states as well. While statutes of this type have been declared void in two states, similar statutes remain in effect in at least four states other than California. Third, and most important, the statute involved represents all the vices of the vaguest criminal statutes. Not only are those charged with its violation not given fair warning that their conduct runs afoul of the criminal law, not only are those charged given no basis on which to prepare a defense, but policemen, prosecutors, judges and juries are authorized to punish conduct on no basis more substantial than that they find the conduct reprehensible. This is the substance of a government of men, not of law.

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v. Superintendent of N.Y.S.R. for Women, 21 N.Y.S. 2d 653 (1940); *People v. Stevens*, 74 N.Y.S. 2d 346 (1947) and *People v. Burke, et al.*, 267 N.Y. 571, 196 N.E. 585 (1935).

[17] *State v. Musser*, 118 Utah 537, 223 P. 2d (1950); *Jennings v. State*, 16 Ind. Rep. 335 (1861).

Conclusion.

It is most earnestly submitted that for the foregoing reasons, the questions presented by this appeal are substantial and should be reviewed.

Respectfully submitted,

RONALD H. BONAPARTE and
DAVID A. BINDER,
By RONALD H. BONAPARTE,
Attorneys for Appellant.

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APPENDIX A.

§650½. *Injuries to Persons, Property, Public Peace, Health or Decency; False Personation for Lewd Purpose.*—A person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, or who willfully and wrongfully in any manner, verbal or written, uses another's name for accomplishing lewd or licentious purposes, whether such purposes are accomplished or not, or who willfully and wrongfully uses another's name in any manner that will affe or have a tendency to affect the moral reputation of the person whose name is used generally, or in the estimation of the person or persons to whom it is so used, or who with intent of accomplishing any lewd or licentious purpose, whether such purpose is accomplished or not, personifies any person other than himself, or who causes or procures any other person of persons to identify him, or to give assurance that he is any other person than himself to aid or assist him to accomplish any lewd or licentious purpose, for which no other punishment is expressly prescribed by this code, is guilty of a misdemeanor.

APPENDIX B.

Criminal Law of South Dakota, Section 13.1701.

§13.1701. *General provisions: offenses not specifically designated.* Every person who willfully and wrongfully commits any act which openly outrages public decency and is injurious to public morals, although no punishment is expressly provided therefor is guilty of a misdemeanor.

APPENDIX C.

Criminal Law of North Dakota, Section 12-22-01.

§12-22-01. *Injury to public decency and morals—Misdemeanor.*—Every person who willfully and wrongfully commits any act which openly outrages public decency and is injurious to public morals, although no punishment is expressly prescribed therefor, is guilty of a misdemeanor.

APPENDIX D.

Oklahoma Penal Code, §22.

§22. *Gross injuries—Grossly disturbing peace—Openly outraging public decency—*

Injurious acts not expressly forbidden:

Every person who willfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages public decency, and is injurious to public morals, although no punishment is expressly prescribed therefor by this Code, is guilty of a misdemeanor. R.L.1910, § 2793.

APPENDIX E.

New York Penal Code, §43.

§43. *Penalty for acts for which no punishment is expressly prescribed.*

A person who wilfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly

prescribed by this chapter, is guilty of a misdemeanor; but nothing in this chapter contained shall be so construed as to prevent any person from demanding an increase of wages, or from assembling and using all lawful means to induce employers to pay such wages to all persons employed by them, as shall be a just and fair compensation for services rendered.

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APPENDIX F.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles Superior Court No. CR A 6356, Trial Court No. M 69269.

People of the State of California, Plaintiff and Respondent, vs. Peter Wylan, Defendant and Appellant.

Filed: Sep. 17, 1965. William G. Sharp, County Clerk. J. MacGregor By J. MacGregor, Deputy.

On Appeal from the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California. John F. Hassler, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the order granting probation (referred to as "judgment" in notice of appeal) made and entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

By the Court. September 17, 1965.

Aiso *Presiding Judge,* Breitenbach, *Judge.* Weisman *Judge.*

APPENDIX G.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, Superior Court No. CR A 6357, Trial Court No. M 69946.

People of the State of California, Plaintiff and Respondent, vs. Peter Wylan, Defendant and Appellant.

Filed: Sep. 17, 1965. William G. Sharp, County Clerk. J. MacGregor By J. MacGregor, Deputy.

On Appeal from the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California. John F. Hassler, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the order granting probation (referred to as "judgment" in notice of appeal) made and entered in the Municipal Court of the Pasadena Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

By the Court. September 17, 1965.

Aiso *Presiding Judge.* Breitenbach, *Judge.* Weisman, *Judge.*

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PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Motion to Affirm With Argument and Points and Authorities in Support Thereof.

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IN THE

Supreme Court of the United States

October Term, 1965
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PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO AFFIRM.

(The Judgment of the Appellate Department of the Superior Court, in and for the County of Los Angeles, State of California, sustaining the Judgment and Sentence of the Municipal Court in and for the Pasadena Judicial District.)

ARGUMENT AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION.

I.

The Appellate Department of the Superior Court, In and for the County of Los Angeles, State of California, has direct appellate jurisdiction over all Inferior Courts within the county, of which the Municipal Courts in both the Los Angeles and Pasadena Judicial Districts are included, as are all other Municipal Courts within the county.

Thus the so-called "authority" cited by Counsel for Appellant in his "Motion To Ask Leave of Court To Supplement The Jurisdictional Statement" is no authority at all, but merely the opinion of a trial judge in a neighboring Inferior Court Judicial District. A trial judge, incidentally, who stands in the same position as the judge from whom this appeal was originally taken to the Appellate Department of the Superior Court, which has direct appellate jurisdiction over both of them; and which court had already ruled to the *contra* on numerous occasions involving almost identical fact situations and a specific challenge to the same statute.

It may indeed be true that these decisions and their opinions were not reported in the official California Appellate Reports. The decisions of the Appellate Department of the Superior Court rarely are. However, this does not make them any the less binding upon the Municipal Courts within this county.

Such opinions are nonetheless routinely reported in the form of "Memorandum Opinions", on loose-leaf, mimeographed forms; and made available to all Municipal Court Departments within the County; the Law Library; Prosecutors; City Attorneys; and any private

Counsel sufficiently interested in an Inferior Court practice to arrange for the service.

The Appellate Department of the Superior Court, in and for the County of Los Angeles, has in fact, as recently as November 18, 1965, written a nineteen page opinion sustaining the constitutionality of the Penal Code Section here under attack by appellant, to wit: Section 650½ of the Penal Code of the State of California, on the identical points herein raised by appellant. That case is *People v. Jeanne Davis, etc. Harlan Clay Davis,* CR A 6430 and CR A 6431.

In that opinion, the Appellate Department makes the following specific statement:

> "Our Appellate Department of the Los Angeles Superior Court had before it the questions of whether Penal Code Section 650½ is vague and whether it is unconstitutional. Our Appellate Department has upheld the section. We see no reason to change. It is not vague or unconstitutional. *People v. Neary, (1964) CR A. 5678; People v. Burt (1963) CR A 5264; People v. Sun Era (1964) CR A 5818; People v. Smith (1963) CR A 5214; People v. Rohauer (1959) CR A 3911.* The State has preempted the field of law on sexual activity, and Penal Code Section 650½ is a portion of the sexual activity statutes of the State, thus approving from a practical standpoint its constitutionality. *In re Lane (1962) 58 Cal. 2d. 99, 104; In re Moss (1962) 58 Cal.App. 2d. 117, 119.* The constitutionality is assumed, also, in *People v. Proctor (1956) 46 Cal. 2d. 481, 482, 483.* These cases also recognize that California's scheme of justice recognizes both sections 314, and 650½ of the Penal Code."

II.

In the instant case it is our contention that a dental office in a regular professional building in a populous city is as much a "public place" as a barber shop, which was specifically held to be a "public place" in this state in the case of *In re Zorn* (1963), 59 Cal. 2d 650. 652. See also *United States v. Barner* (1961), 195 Fed. Supp. 103, 105.

We contend further that it is an offense against public morals and an outrage to "public decency" for a dentist in such an establishment, licensed by the State of California to practice a presumably respectable profession, to surreptitiously take the hand of an unsuspecting woman patient as she sits in his dental chair, pull it down and back where she could not see, and place it upon his bare penis during the course of his professional practice as a dentist.

That he did not in fact "expose his private parts" to her shocked and outraged view, thus escaping the more specific prohibition of Penal Code Section 314, should not make him any the less culpable under an appropriate statute, in this instance Section 650½ for his indecent and reprehensible conduct against public decency.

> "Statutes are to be construed, if their language permits, so as to render them valid and constitutional rather than invalid and unconstitutional. The proper construction to be given to a statute is to be found by construing it as a whole and harmonizing its various parts." *People v. Hampton* (1965), 236 A.C.A. 920 (syllabus).

The offenses charged in this case give sufficient notice of the offenses with which Appellant was charged in the trial court. *People v. Roberts* (1953), 40 Cal. 2d 483; *People v. Price* (1941), 46 Cal. App. 2d 59, 61; *People v. Severino* (1953), 122 Cal. App. 2d 172, 179, 181.

III.

Penal Code Section 650½ is a general law prohibition, intended by the State Legislature to cover those offenses against public decency and good morals which have not been stated directly and prohibited by being made specifically punishable in other sections of the Penal Codes of California.

Legislatures cannot possibly receive evidence on all possible variations of potential violations against decency, the human mind and character being what it is, yet they may nonetheless word a valid penal statute to protect the public from the weird machinations of such minds and character. The variation in human conduct is such that a general standard may be referred to provided that standard is a matter of common thinking and knowledge throughout the state. We are not dealing here with a City Ordinance of some over-sensitive city. Section 650½ of the Penal Code of the State of California is an enactment by the lawmakers of the entire State.

The word "public" is defined in the dictionary and is commonly accepted to mean "the general body of mankind or of a nation, state, or community." *Gardner v. Vic Tanny Compton, Inc.* (1960), 182 Cal. App. 2d 506, 510; *In re Zorn* (1963), 59 Cal. 2d 650, 652; *United States v. Barner* (1961), 195 Fed. Supp. 103, 105.

IV.

The United States Supreme Court in upholding this same Appellate Department in *Roth v. U.S.* and *Alberts v. California* (1957), 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, declared:

> "Lack of precision in a criminal statute is not itself offensive to the requirements of due process; the constitution does not require impossible standards, and all that is necessary is that the language convey sufficient definite warning as to the proscribed conduct when measured by common understanding and practices."
>
> "Freedom of expression can be constitutionally suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." (From separate opinions by Justices Douglas and Black.)

This last quotation obviously means *conduct,* and we are concerned only with the conduct of Appellant in the instant case.

V.

In *Williams v. United States* (1951), 341 U.S. 97, 71 S. Ct. 376, the Court upheld 18 U.S.C.A. (1952), Sec. 242, making it a crime for "any person, under color of any law, to subject any inhabitant to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States."

We respectfully submit that this is a clear-cut example of a "catch-all statute", and therefore precedent for the constitutionality of such a statute as the one under attack here.

VI.

In *Jordan v. De George* (1950), 341 U.S. 223, 231, 232, the United States Supreme Court in a moral turpitude case said:

> "We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. *United States v. Wurzbach, 280 U.S. 396, 399; 74 L. Ed. 508, 510; 50 S. Ct. 167 (1930).* Impossible standards of specificity are not required. *United States v. Petrillo, 332 U.S. 1; 91 L. Ed. 1877; 67 S. Ct. 1538 (1947).* The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Connally v. General Constr. Co. 269 U.S. 385; 70 L. Ed. 322; 46 S. Ct. 126 (1926).*"

Again we respectfully submit that this test has been satisfactorily met in the instant case.

VII.

The fundamental fallacy in the argument of Counsel for Appellant is that because application of a law under *possible circumstances, or the facts of some possible occurrence, might constitute a violation of one's constitutional rights that therefore the statute is unconstitutional, and that the constitution was violated in the instant case.*

In a recent decision the California Supreme Court in the case of *Franklin Insurance Co. v. State Board of Equalization* (1965), 63 A. C. 221, 226, held:

> "The valid employment of the statute in the present situation does not fail because the statute might be improperly involved in other situations. . . . It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. (Citing cases). The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual contention now before the court."

VIII.

Conclusion.

As we have previously suggested, we are not dealing here with the somewhat intangible subject of pornography. We are not dealing with the far-reaching constitutional right of free press or freedom of expression. We are instead dealing with conduct.

The sweeping charges of vagueness and unconstitutionality made by appellant, because of lack of particularity, may indeed make consideration of their contents unnecessary. In *Whitney v. California* (1927), 274 U.S. 357 at p. 369, 71 L. Ed. 1095, the court states that one assailing a legislative classification as unconstitutional has the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary:

> "A state may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses."

Under the Federal constitution, the United States Supreme Court is assumed to be limited to a consideration of the specific denials of federal rights. In *Nash v. U.S.* (1913), 229 U.S. 373, 57 L. Ed. 1232, opinion by Mr. Justice Holmes, the court contemplates the matter of vagueness in a criminal statute and states (at p. 377 U.S.; p. 1235 L. Ed.):

> ". . . the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. . . . *The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.*" (Emphasis ours.)

If we may paraphrase the language of the court in *People v. Radaha* (1947), 69 N.Y.S. 2d 722, in its definition of "public decency" on page 724:

Public decency as used in this statute connotes the moral standard by which the people in the various communities of the State abide. That standard does not include the type of conduct practiced by the appellant here. To come within the Statute that set standard need not be outraged by acts coming to the attention of the majority of the people of the state, or even of one community. It is outraged just as surely if the acts come to the attention of only one person who lives and relies on that standard. The use of the term "public decency" in this statute is in a subjective rather than an objective sense.

It is respectfully submitted that for the foregoing reasons, the judgment and sentence of the state courts should be affirmed.

BYRON B. GENTRY,

Pasadena City Prosecutor,

Attorney for Appellee.

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IN THE

Supreme Court of the United States

October Term, 1965
No. .....

PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

APPELLANT'S REPLY TO MOTION TO AFFIRM.

1. In the motion to affirm of appellee, no discussion is made either of the case of *Graccio v. Pennsylvania,* 34 Law Week. 4099 (1966), or of the case of *Musser v. Utah,* 333 U.S. 95 (1947). Instead, under Section III of its brief the appellee describes Penal Code Section 650½ as "a general law prohibition intended by the State legislature to cover those offenses against public decency and good morals which have not been stated directly and prohibited by being made specifically punishable in other sections of the Penal Code of California". This is exactly the type of statute which does not mea-

sure up to the requirements of the Due Process clause, as set forth in the case of *Graccio v. Pennsylvania, supra.* For in attempting to cover up the gaps that might otherwise exist in criminal legislation of California, the legislature has enacted, in Section 650½, a statute which allows conviction in the unguided discretion of arresting officers, judges and juries. In other words, the appellant here was in the same position as the appellant in the case of *Graccio v. Pennsylvania,* where the Court said, "it would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct' or 'reprehensible' conduct."

2. In Section II, appellee states that a "dental office in a regular professional building in a populated city is as much a 'public place' as a barber shop," and therefore Section 650½ of the Penal Code should be held to apply to activities within. In other words, appellee is suggesting that the use of the word "public" in the statute limits its coverage in much the same manner as this statute has been limited by judicial interpretation in the states of Oklahoma and New York. Jurisdictional Statement, page 9, footnote 16. In the state court hearings below, appellant argued that Section 650½ should be restricted in coverage by judicial interpretation and that a dental office should not be considered a public place. The court below did not consider whether a dental office was a public place. For, the appellee argued below that the statutory language of Section 650½ was so broad as to cover activities anywhere and not just in a

"public place" and therefore, there should be no such limitations. The trial court and the Appellate Department of the Superior Court both agreed with the appellee that Section 650½ of the Penal Code had language so broad as to cover activities committed anywhere and that the place of commission was irrelevant. The appellee by his own actions below has insured that Section 650½ is a statute without any judicial limitation on coverage.

Again, appellant submits that the questions presented by this appeal are substantial and should be reviewed.

Respectfully submitted,

RONALD H. BONAPARTE,
Attorney for Appellant.

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IN THE

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October Term, 1965

No. 991

PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

PETITION FOR REHEARING.

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PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

PETITION FOR REHEARING.

Appellant, Peter Wylan, petitions this Court for a rehearing from its *per curiam* decision, dated May 23, 1966, dismissing his appeal on the ground of want of jurisdiction, and, taking his appeal as a petition for a writ of certiorari, denying certiorari. This petition is based on the effect upon this matter of the case of *In re Davis,* California District Court of Appeal. Second Criminal No. 11822. .... Cal. App. 2d .... Cal. Rptr. .... (June 3, 1966). Appendix A.

Appellant's appeal is based entirely on the question of the constitutionality of Section 650½ of the California Penal Code. *In re Davis, supra* holds that Section 650½ violates the United States Constitution in that it

does not meet the test for certainty laid down by United States Supreme Court in cases such as *Connally v. General Construction Company,* 269 U.S. 385, and *Musser v. Utah,* 333 U.S. 95, namely, that a penal statute must not be so uncertain "that men of common intelligence must necessarily guess at its meaning and differ as to its application."

The defendants in *In re Davis, supra,* were in exactly the same position as the appellant. Both were charged with violations of Section 314(1) and Section 650½ of the California Penal Code. Both were acquitted of the specific charge (Sec. 314) and both were found guilty of violating Section 650½. Here the similarity ends, for the effect upon the defendants in *In re Davis, supra,* of their conviction of Section 650½ was the restriction of their right to operate a bar featuring "topless waitresses". Appellant will lose his right to practice dentistry under Section 1679 of the California Business and Professions Code, if his conviction is not reversed.

Appellant is restricted in his rights for relief to this Court. After his conviction in the trial court, the highest California court he could appeal to was the Appellate Department of the Superior Court of Los Angeles County (Rule 63, California Rules of Court). Because appellant was fined and placed on probation without a jail sentence, there was and is considerable doubt whether any of the extraordinary writs, such as the petition for writ of habeas corpus, would ever be open to him under California law. And yet he now stands to lose his license to practice, because of a conviction under a statute which the California courts recognize as unconstitutional.

Appellant is in the same situation as the defendant in *Smith v. California,* 357 U.S. 259. In the latter case, after this Court had granted a petition for writ of certiorari, a California Supreme Court decision held the criminal statute involved unconstitutional. This Court then remanded the case back to the Appellate Department of the Superior Court in California for reconsideration. In view of the obvious unconstitutionality of Section 650½ of the Penal Code and the effect that this conviction will have upon appellant's right to practice his profession, appellant respectfully asks this Court to follow the same procedure it did in *Smith v. California, supra.*

Conclusion.

Appellant asks this Court to grant his petition for rehearing, vacate the judgment of the trial court below, and remand the case to the Appellate Department of the Superior Court of Los Angeles County for reconsideration in accordance with the decision in *In re Davis, supra.* Or, in the alternative, appellant asks this Court to grant his petition for rehearing, and note probable jurisdiction, or treating this appeal as a petition for a writ of certiorari, grant certiorari.

Respectfully submitted.

RONALD H. BONAPARTE and
DAVID A. BINDER,
By RONALD H. BONAPARTE,
Attorneys for Appellant.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

RONALD H. BONAPARTE,
Attorney for Appellant.

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APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

In re Jeanne Davis and Harlan Clay Davis, on Habeas Corpus. 2nd Criminal No. 11822.

Proceeding in habeas corpus to determine constitutionality of portion of misdemeanor statute under which petitioners were convicted. Writ granted.

Stanley Fleishman, for Petitioners.

Kurlander, Shettler & Solomon and Stephen Warren Solomon, as Amicus Curiae on Behalf of Petitioners.

A. B. Keel, City Attorney, City of Hawthorne, for Respondent.

Roger Arnebergh, City Attorney (Los Angeles); Philip E. Grey, Assistant City Attorney; Allen U. Schwartz, Deputy City Attorney, as Amicus Curiae on behalf of Respondent.

Petitioners Jeanne Davis and Harland Clay Davis, husband and wife, were each convicted in the municipal court of violating that portion of section 650½ of the Penal Code which makes it a misdemeanor 'wilfully and wrongfully" to commit any act "which openly outrages public decency," provided that no other punishment for such act is prescribed by the Penal Code.

In the same trial Jeanne Davis was acquitted of a charge of violating section 314 (1) of the Penal Code; a charge of violating section 314 (2) of the Penal Code against Harland was dismissed in furtherance of jus-

tice.[1] The judgments were then appealed to the appellate department of the superior court which affirmed by written opinion. At the request of petitioners and of the District Attorney of the County of Los Angeles[2] a rehearing was granted. After rehearing the judgments were again affirmed. The appellate department, proceeding under California Rule of Court 3, certified the case to this court, petitioners having applied for such a certification. We denied transfer. (Cal. Rules of Court, rule 62 (a).)

Mr. and Mrs. Davis then petitioned the Supreme Court for a writ of habeas corpus asserting that section 650½ of the Penal Code was unconstitutional. That court entered an order directed to the Chief of Police of the City of Hawthorne, ordering him to show cause before this court why the relief prayed for should not be granted. In his return the respondent chief of police does not question the propriety of the writ as a means of testing the constitutionality of the statute.

The incident out of which the charges against petitioners grew occurred on June 26, 1964, at a bar operated by them. The facts are not in dispute. We quote from the trial judge's memorandum:

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[1]Section 314 of the Penal Code reads in part as follows: "Every person who willfully and lewdly, either 1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or 2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thought or acts, is guilty of a misdemeanor."

[2]The district attorney did not urge any particular result, but merely pointed out that the appellate department's opinion, as then written, raised certain troublesome questions for law enforcement and requested clarification.

"On June 26, 1964, in the city of Hawthorne, County of Los Angeles, State of California, at a restaurant and bar called the Golden Nugget, the defendants held a fashion show, starting at about 7:30 p.m.

"About 150 people were in attendance. They all had been invited by Mr. Davis. Three girls modeled lingerie, baby dolls and swim suits.

"Mr. Davis then announced that it was time to model the topless bathing suit, and that if anyone would feel offended by the female form, to leave 'or forever hold your peace.'

"Mrs. Davis walked to a stage about one foot high and ten feet square. The spectators were standing around the stage. She was clad in a knee length leopard skin dress. She unfastened it and handed it to Mr. Davis. She was then clad solely in the bottom portion of a bikini, also leopard skin, supplemented by two slender leopard skin ribbons. Her breasts were bare. . .

"She remained that way between a half minute and a minute. She was facing the bar at first, then turned toward a policeman she knew was in attendance with a camera, then turned toward the bar. The policeman took the photographs constituting People's Exhibits 1 through 5, in evidence.

"She did not shake or jump while modelling.

"Afterwards Mr. Davis asked the policeman if an arrest would be made. The policeman said none would be made at that time. Mr. Davis said that he knew six people who would sign a complaint and if no complaint were filed it would cost them $6,000,000.00 in publicity, because several national magazines were waiting for a complaint to be filed.

"Defendant's Exhibits A through D are magazines purchased in a liquor store in the city of Hawthorne. They were received in evidence, as defense counsel stated 'for the purpose of establishing contemporary standards in attempting to define the words 'lewdness'' and 'indecent exposure.'

"Character witnesses testified that the reputations of the defendants for morality and decency are good. The defendants did not testify."

The magazines referred to are devoted in large part to photographs of nude women, wearing considerably less than Mrs. Davis did on the occasion in question.

The trial judge's memorandum, in which he explained the basis of his decision, also contains the following: "In this count [Penal Code, section 650½] the defendants are charged with outraging public decency.

"The word 'decency' is defined as 'freedom from obscenity or indecorum; modesty.' The word 'decorum' applies especially to that which is decent or becoming in manners or conduct; it frequently implies little more than the absence of all that is unseemly."

This language, though not quite free from doubt, strongly implies that the trial court gave the broadest possible definition to the word "decency," equating it with "decorum" and "seemliness." We mention this, not to indicate that such a construction is erroneous, but merely to show that it is one which is reasonably possible.

Before proceeding to discuss the merits of petitioners' claims, it seems proper—in spite of respondent's concession—to explain why we think that habeas corpus is an appropriate remedy. At first blush one might

suppose that the principles expressed in *In re Sterling*, 63 Cal. 2d 486 preclude petitioners from attacking a final judgment in such a proceeding as this. A closer reading of *Sterling*, however, convinces us that the rule of that case is confined to situations where the asserted violation of constitutional rights has no bearing on the question of guilt. *Sterling* involved the use of allegedly illegally seized evidence. Such evidence, though inadmissible if obtained in violation of the Fourth Amendment, usually removes any lingering doubt that an innocent person has been convicted. The constitutional attack in the present case, on the other hand, goes to the very heart of the People's case against petitioners, that is to say, the validity of the statute[3] under which they were convicted. *Sterling*, therefore, is no obstacle to the review petitioners seek, for which there is otherwise ample precedent. (*In re Jackson*, 61 Cal. 2d 500, 503; *In re Dixon*, 41 Cal. 2d 756, 762; *In re Bell*, 19 Cal. 2d 488, 492-495.)

The main thrust of the attack on the portion of section 605½ of the Penal Code involved here is the claim that the statute is unconstitutionally vague.

As has been pointed out by many writers,[4] the vagueness of a statute may lead to a judicial inability to enforce it, regardless of constitutional considerations. The Roman maxim "ibi jus uncertum, ibi jus nullum"

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[3]Wherever in this opinion we refer to "the statute" or "section 650½," we refer only to that portion of the section under attack, unless the context of the discussion indicates otherwise.

[4]See for example Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L.Rev. 67 (1960); Collings, *Unconstitutional Uncertainty — An Appraisal*, 40 Cornell L.Q. 195 (1955); Comment, 53 Mich. L.Rev. 264 (1954); Note, 62 Harv. L.Rev. 77 (1948).

is considerably older than the Fourteenth Amendment. For obvious reasons, however, attacks on statutes on the basis of vagueness are generally made on constitutional grounds. The additional remedies—such as the present proceeding—afforded by reliance on the Constitution point up the wisdom of such a course.

The classic formulation of the test for unconstitutional vagueness is that of Justice Sutherland in *Connally v. General Construction Co.*, 269 U.S. 385, 391: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirements, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

It is, of course, not surprising that the practical application of this test in concrete cases has not always resulted in unanimous opinions. Thus in *Winters v. New York*, 33 U.S. 507, the Supreme Court divided six to three on the constitutionality of the New York statute involved, and in our own state, to cite a fairly recent example, our Supreme Court was far from unanimous in holding that the term "loiter" was sufficiently definite. (*In re Cregler*, 56 Cal. 2d 308.) As one learned writer on the subject has observed: "There is no sharp line between language which is certain and language which is uncertain. What is uncertain at one time may be certain at another. What is uncertain to one justice

may be certain to another. What is uncertain to one justice in the civil liberties area may be certain to the same justice in the economic sphere".[5]

It goes without saying that "All presumptions and intendments favor the validity of a statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. Statutes must be upheld unless their unconstitutionality clearly, positively and unmistakably appears." (*Lockheed Aircraft Corp., v. Superior Court*, 28 Cal. 2d 481, 484.) Further, "Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible." (*People v. Hallner*, 43 Cal. 2d 715, 720.) Also, "It is not required that a statute, to be valid, have that degree of exactness which inheres in a mathematical theorem. It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited." (*Kelly v. Mahoney*, 185 Cal. App. 2d 799, 803-804.)

We approach the subject statute with these principles in mind. That it poses problems cannot be doubted—the question is whether they can be solved.

First and foremost—and in view of the conclusion that we have reached we need go no further—there is the problem of what is meant by "public decency." Does the word "decency" refer merely to bad manners or to immoral conduct or, more specifically, to immoral conduct with overtones of sex, eroticism or nudity? Does the term "an act . . . which openly outrages public decency" refer to conduct decent and moral when done

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[5]Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 Cornell L.Q. 195 (1955).

in private, but not when in public; or conduct indecent or immoral, or both, even if private, which outrages the "public", whether done in private[6] or public? Finally, even if we decide which attitude of the public, the moral or the decorous, is the one which must be outraged, there is the question "who is the public"? Do twelve jurors automatically represent it? That answer is a great deal easier to give in a homogeneous society, in times of well established precepts of morality and manners, such as Victorian England, than today. Our American—and more particularly, our Californian—society, on the other hand, is highly heterogenous in religion, race, social background and national origin, a fact which gives little assurance that the collective judgment of one jury will, in all but the most extreme cases, be anything like that of another.[7] When the statute speaks of "public decency" does it presuppose some kind of consensus among the majority of the public as to what is and what is not "decent" and, if that assumption is wrong, to which segment of the public is the trier to look?

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[6]This particular problem appears to have been laid to rest by cases such as *People v. Stevens,* 190 Misc. 441, [74 N.Y. Supp. 2d 346]; *People ex rel. Radaha v. Mock,* 69 N.Y. Supp. 2d 725; *Gunn v. Territory,* 19 Okla. 240; *State v. Lawrence,* 9 Okla. Crim. 16; *Rachel v. State,* 71 Okla. Crim. 33 and *State v. Stevens,* 33 N.D. 540, holding, in effect, that private misconduct is not done "openly" as required by New York and Oklahoma statutes similar to section 650½.

[7]That the United States Supreme Court looks with disfavor on definitions of crimes which would leave it to the moral judgment of juries to determine whether or not a crime has, in fact, been committed is demonstrated by *Musser v. Utah,* 333 U.S. 95. In that case the defendants had been convicted under a statute which made it illegal to conspire "to commit acts injurious to public morals. . ." The Supreme Court remanded the case to the Utah Supreme Court, in order to give that court an opportunity to determine what the statute meant. In doing so, it said: "Standing

The above are not all the possible permutations of the uncertainties lurking in the statute, but they are sufficient to set the stage for our discussion.

As already noted, the mere fact that different interpretations of the statute are possible does not make it unconstitutional. Just as we are bound by the standard of vagueness laid down by the United States Supreme Court, so we are told by the same court that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." (*Nash v. United States,* 229 U.S. 373, 377; see also *United States v. Petrillo,* 332 U.S. 1, 7; *United States v. Ragen,* 314 U.S. 513, 523; *United States v. Wurzbach,* 280 U.S. 396, 399.)

Courts have looked far afield for aids in construing statutes in such a way that language, which at first glance seems vague, acquires certainty. Therefore we proceed to examine what help we can get from sources other than the statute itself.

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by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order." (While the statute permitted punishment for conspiracy to commit acts injurious to public health, morals, trade, commerce, etc., the information in *Musser v. Utah* only charged conspiracy to commit acts injurious to public morals.) Our own Supreme Court, has pointed out that the Constitution of the State of California requires all general laws to be of uniform operation. (Const., art I, § 11.) "That provision will not tolerate a criminal law so lacking in definition that each defendant is left to the vagaries of individual judges and juries. Yet, as we have pointed out above, such is the inevitable result of attempting to enforce a law punishing a 'common drunk,' whereunder a person drunk, for example, once a week for four months could be found guilty of a violation of subdivision 11 of Penal Code, section 647, in one jurisdiction but not in another." (*In re Newbern,* 53 Cal. 2d 786, 797.)

First of all, if the statute has been judicially construed, such construction of the statutory words becomes part of the statute "as if it had been so amended by the legislature." (*Cramp v. Bd. of Public Instruction,* 368 U.S. 278, 285; *Winters v. New York, supra,* p. 514.) Diligent research by counsel, by amicus curiae[8] and by ourselves has not revealed any authoritative construction of that portion of section 650½ now under discussion, either in this state, or in any other having an identical statute.[9] The one New York decision relied on by the appellate department—*People v. Radaha,* 69 N.Y. Supp.2d 722—which defined "public decency" as "the moral standard by which the people in the various communities of the state abide . . ." was reversed by a higher court. (*People ex rel. Radaha v. Mock,* 69 N.Y. Supp. 2d 725.)

At least two decisions from other states deal with statutes similar to but not identical with ours. In *State v. Waymire,* 52 Ore. 281 and *Roberts v. State,* 27 Okla.Crim. 97 the courts discussed statutes which prohibited the wilful and wrongful doing of an act "which openly outrages the public decency *and is injurious to public morals.*" The Oregon court came to

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[8]The City Attorney of Los Angeles and Messrs. Kurlander, Shettler & Solomon have filed briefs for which we are most grateful.

[9]Section 650½ of our Penal Code was enacted by stats. 1903, Ch. 201. The identical New York law appears to be at least twenty-two years older. Several of the states, at one time or another, have enacted similar but not identical statutes. One distinction between at least two of such other state laws and section 650½ is the addition of the words "and is injurious to public morals" after the words "public decency," as contained in our statute. The Oregon and Oklahoma laws, later adverted to, are of that type. The Georgia statute, also discussed, adds the requirement that the act "tend to debauch the morals."

the conclusion that its statute was directed against offenses which at common law were known as "indictable nuisances."[10] It did not otherwise define the crime, but simply referred to a series of English cases, later discussed in this opinion, which held certain acts "*contra bonos mores*" to be indictable offenses. The Oklahoma court was more specific. "The true rule of interpretation of this statute should be and is that any act which is so grossly immoral as to shock the sense of decency of self respecting people as a whole, or an act manifestly indecent and repugnant to the usages and customs of civilized society, or *any act which is unquestionably criminal, though not covered by any other criminal statute,* is a violation of the act, independent of what the people of any particular community may think about it." (*Roberts v. State, supra,* p. 103. Emphasis added.)

Apart from the fact that the Oregon statute by its very wording solves one of our problems, in that it contains the words "and is injurious to public morals," this judicial definition raises more problems than it solves. It seems to assume that an act can be "unquestionably criminal" although it is not covered by a criminal statute. This, as we will discuss below at some length, simply cannot be.[11]

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[10]The only indictable nuisances listed by Blackstone (4 Blackstone, 166-173) which generally fall in the field of decency and morals are disorderly inns, brothels, gaming houses, stage plays, stages for rope dancers, mountebanks and the like, eavesdropping, being a common scold, idleness, luxury and gaming. Thus if the Oregon court is correct, its analysis leads into a blind alley, but as the cases cited by it show, it probably used a broader definition of the word "nuisance" than did Blackstone.

[11]In *Roberts v. State, supra,* the defendant, a white man, was said to have outraged public decency and injured public morals by associating with a Negro woman in public and in private and

Irven v. State, 138 Tex. Cr. 368, [136 S.W. 2d 608] involved a Texas statute which made it a misdemeanor for the holder of a liquor license to permit at his place of business "any conduct by any person whatsoever that is lewd, immoral, or offensive to public decency." An information against the defendant alleged that he permitted a customer on his premises who was intoxicated and whose conduct in such intoxicated condition "was then and there offensive to public decency." The court ordered the prosecution dismissed, stating that the term "offensive to public decency" was "too indefinite of enforcement." (Followed in *Chapa v. State,* 170 Tex. Crim. 525.)

A finding of uncertainty is often avoided if the court can derive assistance from the legislative history of the statute or a settled common law meaning of its terms. (*In re Newbern,* 53 Cal. 2d 786, 795; *People v. McCaughan,* 49 Cal. 2d 409, 414.)

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by living with her. The conviction was reversed for technical defects in the indictment, athough the court declared that "social equality between the races is of course unthinkable; such equality would bring about the moral degradation of both races." The interesting part of the opinion from our point of view is that the court declared in the strongest possible language that the trial judge should not have instructed the jury to apply its "common sense of the community and the sense of decency, propriety and morality which most people entertain in the community in which the acts were alleged to have been committed." The court held that all penal laws must operate uniformly in every place within the territorial limits over which they extend. "To hold that a penal law may or may not operate as such in a particular community, dependent upon public sentiment in that community, would in its last analysis amount to the antithesis of law and result in a kind of anarchy where every community might establish its own penal regulations." We mention this merely because of petitioners' argument, which we do not reach, that there was no evidence before the court of what the community standards of this state are. (cf. *Jacobellis v. Ohio,* 378 U.S. 184, 195; *In re Harris,* 56 Cal. 2d 879, 880.)

The legislative history and purpose of the statute in this state is unknown to us, but for such history and purpose in the state of New York, which has had and still does have an identical statute on its books (New York Penal Law, § 43) we are indebted to the court in *People v. Most,* 36 Misc. 139, [73 N. Y. Supp. 220]; "The plain and obvious intent of this was to leave in the Code a little of the flexibility of the common law to meet cases which they had failed to specify in the preceding sections. That the words of this section are general is just what might be expected from the nature of the case. The purpose of the section is to try offenders for something not 'expressly prescribed by this Code.' If the offense was one expressly prescribed by the Code, then clearly the offender must be tried under the section prescribing it. It is only offenses not prescribed in the Code that can be tried under this section. *This section is the legislative mandate and warrant for courts to look outside of all the other sections of the Code to discover offenses not specified in the Code.* Otherwise the section is meaningless. It is fair to presume that the Legislature thought that crimes would crop up that would 'seriously injure the person or property of another,' or 'seriously disturb or endanger the public peace,' or 'openly outrage public decency,' that were not mentioned in the body of the Code, and so *this commission was issued to the courts to explore such new fields of crime as they may appear from time to time.*" (*Ibid.,* pp. 140-141, Emphasis added.)

Leaving aside, that a method of criminal legislation, which to use the words of the court, makes it a judicial function "to explore such new fields of crime

as they may appear from time to time" is wholly foreign to the American concept of criminal justice[12] (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 16; Pen. Code, § 6; *People v. Harris,* 191 Cal. App. 2d 754, 758), it seems obvious that if the court's historical information is correct, no common law definition of the offense is likely to exist, because the Legislature had no common law crime in mind.

Our own research persuades us that the historical analysis of the court in *People v. Most, supra,* is almost, but not quite correct. It must be remembered that the English courts did not operate under a system of separation of powers as strict as ours, that within limits which need not be further discussed they were much freer to "discover" new offenses and that when they did so, they were under no compulsion to define the offense with the exactitude of a legislative enactment, particularly one which is subject to constitutional scrutiny. As recently as 1961 Viscount Simonds stated in the House of Lords, in *Shaw v. Directors of Public*

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[12]The kind of blank check from the Legislature of which the New York court speaks, not only poses problems of due process because of vagueness, but raises very serious questions concerning the principle of separation of powers. (11 Cal. Jur.2d "Constitutional Law" § 132.) This, of course, is primarily a question under our state Constitution. Compare a German law, signed by Adolf Hitler on June 28, 1935 which, in translation, reads in part as follows: "Whoever commits an act which the law declares to be punishable *or which deserves punishment according to the fundamental concept of a penal law and sound popular feeling,* is punishable. If there is no penal law which directly applies to such deed, it shall be punished according to the law the basic concept of which is most applicable." An old Chinese statute quoted in *Chicago & N.W. Ry. Co., v. Dey,* 35 Fed. 866, 876 is said to have read: "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows."

Prosecutions [1962] A.C. 220, 267: "In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for . . . It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another considering that it may succeed in its obvious intention of provoking libidinous desires it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of a public mischief or the undermining of moral conduct."

We believe that whoever drew the first American statute similar to, or identical with, the portion of section 650½ which we are discussing, had in mind a rather ill-defined crime first "discovered" in 1663 in the case of *Rex v. Sedley*, 1 Sid. 168.[13] The court held that the King's Bench "was the *custos morum* of all the King's subjects; and that it was then high time to punish such profane actions, committed against all modesty, which were as frequent, as if not only Christianity, but morality also had been neglected."

We are again indebted to the House of Lords for an analysis of how this, to us, rather remarkable claim of jurisdiction, came about. "The time of Charles II. was one of notorious laxity both in faith and morals, and

[13]The case was referred to quite recently in the concurring opinion of Mr. Justice Douglas in *Memoirs v. Massachusetts*, 383 U.S. 413, 428, footnote 4. Sir Charles appeared nude on a balcony at Covent Garden, talked profanely and behaved quite disgustingly in other ways.

for a time it seemed as if the old safeguards were in abeyance or had been swept away. Immorality and irreligion were cognizable in the Ecclesiastical Courts, but spiritual censures had lost their sting and those civil Courts were extinct, which had specially dealt with such matters viewed as offences against civil order. The Court of King's Bench stepped in to fill the gap." (*Bowman v. Secular Society Limited* [1917] A.C. 406, 456-457.)

In 1774 in *Rex v. Delaval*, 3 Burr. 1434, Lord Mansfield declared unequivocally that: ". . . this Court is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*: and upon this ground, both Sir Charles Sedley and Curl, who had been guilty of offences against good *manners*, were prosecuted here." (Emphasis added.)

It would be a waste of space to detail all the acts which were found punishable under the broad principle thus declared.[14] Most of the cases are discussed, debated and dissected in *Shaw v. Director of Public Prosecutions, supra.* In none of them have we found any exact definition of the crime. The first case among the many examined which even uses the words of our statute—outraging public decency—is *Regina v. Wellard*, (1884) 14 Q.B.D. 63, a run-of-the-mill case of indecent exposure by the defendant in front of a group of girls. Even there the phrase is not further defined. As late

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[14]It is interesting to note, however, that it was held not to be against *bonos mores* to bet on the outcome of an appeal in the House of Lords. (*Jones v. Randall*, (1774) Lofft. 383, 385.) On the other hand, digging up a corpse was "highly indecent and contra *bonos mores*." (*Rex v. Lynn* (1788) 2 Durn & E. 733.) Needless to say we have found no case involving semi-nudity, akin to the case at bar.

as 1961, in *Shaw v. Director of Public Prosecutions, supra,* counsel for the prosecution had to argue that "conduct calculated and intended to outrage public decency" was an indictable crime. (*Ibid.*, p. 248.) This, however, was his definition, not necessarily that of the many authorities he cited.

The true historical posture of section 650-½ and of its brethren and cousins vis-a-vis the common law appears to be this: that it was indeed intended to codify a crime, cognizable by the King's Bench, but never given a definitive description, left purposely vague in order to preserve a fexible judicial attitude toward all kinds of devilry the King's subjects were capable of committing and that it was the intent of the various American legislatures to confer upon the courts a similar power to put down mischief wherever it arose. That such an intent is contrary to our Constitutions and the genius of our criminal law has already been discussed. At this point we merely look to the legislative history and the common law precedents to discover whether the statute can be saved by reading into it some well settled common law meaning. There is no such common law meaning and, in view of the history of the crime involved, it would be very surprising if there were.

Finding no help as far as judicial construction of the entire phrase—"openly outrages public decency"—is concerned, we now turn to some of the particular words which make it up and to their antonyms.

The word "decency" was defined in *Universal Film Manufacturing Co. v. Bell,* 100 Misc. 281, [167 N.Y. Supp. 124] as being synonymous with "propriety of action, speech, dress etc." In *Hall v. State,* 176 Md. 488, 493, the Maryland Court of Appeals had this to

say: "As applied to conduct, it might be said that the word means compliance with current standards of socially desirable conduct which are generally accepted as proper but that would be merely to resolve one doubt in terms of another. Because 'current standards of socially desirable conduct' may mean one thing in one court and something else in another court." These authorities seem to point toward "manners" rather than "morals."

As might be expected "indecent" has received more extensive judicial treatment though, unfortunately, not at all uniform. Thus while the Supreme Judicial Court of Massachusetts informs us that the word is so common that it may be assumed that any ordinary jury would understand it without definition (*Commonwealth v. Buckley,* 200 Mass. 346, 352), the Arkansas Supreme Court says that the word means "morally offensive" (*Dillard v. State,* 226 Ark. 720), New York and Texas[15] think that it means "obscene" (*People v. Brooklyn News Co.,* 12 Misc. 2d 768, 771; [174 N.Y. Supp.2d 813, 817];[16] *Janus Films Inc., v. City of Fort Worth,* Tex. Civ. App. 354 S.W. 2d 597, 600—

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[15]These and other decisions equating "indecent" with "obscene" appear to do so under constitutional compulsion; any other interpretation of the word would infringe on First Amendment rights. See for example *Memoirs v. Massachusetts,* 383 U.S. 413, 418, footnote 6.

[16]It is interesting to note that in New York it has also been ruled that a film of a nudist colony which showed "exposed portions of human bodies" was not indecent because it showed no full exposure of any adult nude body. (*Excelsior Pictures Corp., v. Regents of University,* 2 App. Div. 2d 941, [156 N.Y. Supp. 2d 800].) In *People v. Burke,* 267 N.Y. 571; aff'g. 243 App. Div. 83, [276 N.Y. Supp. 402] it was held not to be violative of section 43 of the Penal Law for defendants to sell tickets at $1.00 apiece, the purchase of which entitled the holder to participate in, or to watch, nude gymnastic exercises performed by members of both sexes.

affirmed 163 Tex. 616), in Georgia it signifies "unseemly, unbecoming, grossly vulgar, indecorous, unfit to be seen or heard" (*Wood v. State,* 45 Ga. App. 783, 788), and one federal judge, with a strong feeling for the nuances of meaning, says that the word means more than "indelicate" and less than "immodest." (*United States v. Loftis,* 12 Fed. 771.) It is a pity that he adds: "And I think it is obscene, also." (*Ibid.,* p. 672.)

On the other hand the Supreme Court of Louisiana in *State v. Kraft,* 214 La. 351 says: "The word 'indecent,' standing alone, has many different meanings, according to the standard of the individual using or defining the word. In Webster's New International Dictionary the word is defined as 'unbecoming or unseemly'; 'indecorous, as *indecent* haste'; 'morally unfit to be seen or heard'; 'offensive to modesty and delicacy, as *indecent* language'; 'immodest'; 'impure'; 'gross'; 'obscene.'" The court then goes on to hold that an indictment or information which merely charges the defendant with having in his possession an indecent print and movie entitled "Mom and Dad" and the statute, upon which the information was based, were invalid: "It is sufficient to say that a criminal statute, in order to be valid and enforceable ,must define the offense so specifically or accurately that any reader having ordinary intelligence will know when or whether his conduct is on the one side or the other side of the border line between that which is and that which is not denounced as an offense against the law."[17] (*Ibid.* p. 355.)

[17]The Louisiana statute in question made it a misdemeanor to possess an "indecent print, picture, written composition, model or instrument."

Dictionary definitions of the word "indecent" are no more precise than those in opinions, which is only natural since the opinions frequently rely on the dictionaries. Without prolonging the matter too much, they, like the opinions, cover the spectrum between "indecorous" and "obscene."

"Public decency," standing alone, appears to have received very little judicial attention. We have already adverted to *People v. Radaha,* 69 N.Y. Supp.2d 722, reversed in *People ex rel. Radaha v. Mock,* 69 N.Y. Supp.2d 725.[18]

The term "public indecency" appeared in an old Indiana statute which subjected to punishment "every person who shall be guilty of notorious lewdness, or

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[18]In *People v. Tylkoff,* 212 N.Y. 197, 201, 202, the highest court of New York had an opportunity to define the crime we are discussing. While the court was unanimous in reversing the decision, there were three opinions, none representing a majority. Significantly, however, in an opinion concurred in by two of the justices we find the following passages: "The most casual reading of this statute at once reveals its peculiarities. It is obviously one of those 'dragnet' laws designed to cover newly invented crimes, or existing offenses that cannot be readily classified or defined . . . : If in groping for some standard of public decency which the statute does not fix or define, we seek light in the prevailing common judgment and moral sense of the community where an act is done or words are spoken, we are no better off than we were before . . . . The trouble with this statute is that it fixes no definite standard or rule of public decency; and in the nature of things that is plainly impossible. To the extent that this statute deals with acts and language so obviously offensive to the general sense of public decency that there is really no room for discussion, the courts of criminal jurisdiction will have no difficulty in applying and enforcing its provisions. In all other cases the courts must construe the statute, as best they can, in the light of the particular charge under investigation."

A later New York court said: "Section 43 of the Penal Law is a catchall section of the Penal Law which apparently was intended to be used for the purpose of imprisoning dissolute persons against whom no other provisions of the Penal Law would apply." (*People v. Stevens,* 190 Misc. 441, [74 N.Y. Supp.2d 346].)

other public indecency. . . ." In two decisions, *McJunkins v. State,* 10 Ind. 140 and *Jennings v. State,* 16 Ind. 335, the Indiana Supreme Court said: "It would therefore appear that the term public indecency has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense."

A Georgia statute which punishes "any person who shall be guilty of open lewdness, or any notorious act of public indecency, *tending to debauch the morals*" has been authoritatively construed on several occasions. (*Kitchens v. State,* 78 Ga.App. 795; *Fowler v. State,* 189 Ga. 733 and *Redd v. State,* 7 Ga. App. 575.) In the first of these cases, *Redd v. State,* the Georgia court defined "indecency" as having not so broad a meaning as it has in popular speech, but broader in meaning than exposure of the human body. "To determine whether an act is indecent within the purview of the statute, the time, the place, the circumstances, and the motives of the actors must be considered . . . A fair test to determine whether an act is notoriously indecent within the purview of this law is to consider whether the general run of the citizenry of the State would readily recognize it as such . . . and also whether it tends to debauch the morals." (*Ibid.,* p. 580.) It will thus be noted that in Georgia not only was the statute more definite, but the court used its additional prohibition against acts tending to debauch the morals for the very purpose of defining "indecency" as used in the statute.

Yet even a judicial interpretation of "decency" which would equate that term with morality would, in our opinion, not save the statute. An Arkansas law prohibited ". . . any act injurious to the public health, or

public morals . . ." In *Ex Parte Andrew Jackson,* 45 Ark, 158 the Supreme Court of that state said in a case in which the defendant was charged with committing an act "injurious to the public morals": "We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed."

Thus even if petitioners here had consulted all the authorities which appear to be available, they would have received little help, and some would have strongly implied, that in the light of modern constitutional law the portion of section 650½ of the Penal Code of which they stand convicted, was unconstitutionally vague.[19]

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[19]The only decision found by us in which a similar statute was attached on the constitutional grounds urged by petitioners here is *State v. Lawrence,* 9 Okla. Crim. 16. There the charge against the defendant was public betting and gambling at a baseball game, which the information alleged, "grossly disturbed the public peace, openly outraged public decency and injured the public morals." The Oklahoma statute in question — as the Oregon law previously discussed — required proof of an act which not only outrages public decency but also "is injurious to public morals." The Oklahoma court assumed that the statute intended, among other things, to make gambling a crime and its decision is based entirely on the fact that gambling had been characterized as a crime against public decency and injurious to public morals by "every

We are not yet, however, completely defeated. Problems of legislative meaning of ambiguous words are often resolved by resort to the context in which a particular word or phrase is used — in other words the canons of construction known as *ejusdem generis* and *noscitur a sociis*. Thus, in *State v. Jackson*, 224 Ore. 337, 355, [356 P.2d 495, 503] the Oregon court said that the words "obscene," "indecent" and "immoral" as used in an obscenity statute express but a single attitude which may be described by the single word "obscene." Similarly in *People v. Eastman*, 188 N.Y. 478, 480 the defendant was convicted under a statute which made it a crime to "sell, lend, . . . any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet . . ." The court held that from the manner in which the Legislature had used the word "indecent" it was clear that the statute was "not an attempt to regulate manners, but . . . a declaration of the penalties to be imposed upon the various phases of the crime of obscenity. The word 'indecent' is used in a limited sense in this connection and falls within the maxim of *noscitur a sociis*."

Respondent cites *United States v. Keller*, 259 Fed. 2d 54 for the proposition that the word "indecent" is not

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appellate court in Christendom," and that it has a well defined meaning. It also felt itself bound by the decision in *Stewart v. State*, 4 Okla. Crim. 564 which had held valid the portion of the statute relating to disturbing the public peace. The case was followed in *Rachel v. State*, 71 Okla. Crim. 33. We are not persuaded that the case affects the one at bar. First, the statute was somewhat more definite; second, it can be explained simply on the theory that whatever uncertainties there were in the Oklahoma statute in some of its possible applications, gambling was clearly covered. See our discussion of the "standing" problem at the end of this opinion. *Chapa v. State*, 170 Tex. Crim. 525 is on all fours with *State v. Lawrence* and holds the exact opposite.

too vague. This is grossly — although, we are certain, unintentionally — misleading. The defendant in *Keller* was prosecuted under Title 18 U.S.C., section 1463 which made it illegal to mail postal cards containing "language of an indecent . . . character." The case was decided after *Roth v. United States,* 354 U.S. 476 where the Supreme Court had sustained Title 18 U.S.C., section 1461, against an attack on constitutional grounds. Section 1461 prohibited the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or of an indecent character. . . ." The Court of Appeals in *Keller* first held that the word "indecent" as used in section 1463 referred to material of the same character as that included in section 1461. Then it said: "Our view is confirmed by rules of statutory construction. Applying the doctrine of *ejusdem generis,* where general words of description which follow more specific terms are restricted in meaning by those which are specific, the word 'indecent' in Section 1461 is limited in ambit to the area covered by 'obscene, lewd, lascivious.' Applying the doctrine of *noscitur a sociis* to Section 1463, the word 'indecent', which precedes 'lewd, lascivious, or obscene', takes its sense and meaning from the associated words. Accordingly, the description 'indecent' is limited in both sections and the area covered by these sections is identical. Concededly, by dictionary definition, the term 'indecent' has a broader range, but in the context of Section 1463, its meaning is restricted to the sense imparted by the adjectives 'lewd', 'lascivious' and 'ob-

scene'." (*United States v. Keller, supra,* p. 57; see also *Fowler v. State,* 189 Ga. 733; *Kitchens v. State,* 78 Ga. App. 795.)

Thus it appears that what saved "indecent" in *Keller* was not any inherent certainty of the word, but the context in which it appeared.

But even this aid to construction is denied us here. Section 650½ is part of a chapter in the Penal Code containing all kinds of miscellaneous offenses such as wire tapping (Pen. Code, § 640), charging a fare for a seeing-eye dog (Pen. Code, § 643.5), disorderly conduct (Pen. Code, § 647), offering rewards with the object of causing the capture of persons "dead" or "dead or alive" (Pen. Code, § 652) and tatooing persons under eighteen (Pen. Code, § 653). Section 650½ makes itself illegal, apart from the commission of acts openly outrageous to public decency, such things as "acts which seriously injure the person or property of another" or "acts which seriously disturb or endanger the public peace or health" or the use of another's name in a manner which would affect his moral reputation.

It is thus clear that the context in which the phrase "acts . . . which openly outrage public decency" appears, is of no help.

Other aids to construction, expressly or impliedly recognized by the courts, are unavailable. There are, of course, no administrative rulings (*Fed. Tr. Comm'n. v. Keppel & Bro.*, 291 U.S. 304; *Cannon v. Industrial Acc. Comm.*, 53 Cal. 2d 17, 22) and the words employed ob-

viously have no technical meaning. (*Omaechevarria v. Idaho,* 246 U.S. 343; *In re Newbern,* 53 Cal. 2d 786, 795.)

Finally — and now we really have reached the end of our rope — there have been occasions when an otherwise vague statute has been saved from unconstitutionality by reading a requirement of specific intent into it. The classic example is *Screws v. United States,* 325 U.S. 91. A parallel California case is *Erlich v. Municipal Court,* 55 Cal. 2d 553. Unfortunately we do not see how the present statute can be saved by that method. In *People v. McCaughan,* 49 Cal. 2d 409 defendant had been convicted under a statute which, among other things, prohibited "harsh" and "unkind" treatment of idiots, lunatics or insane persons. The Supreme Court held that the statute was unconstitutionally vague. "The requirement that defendant must have acted with an intent to be harsh or unkind, however, does not make clear what those words mean." (*Ibid.,* p. 416.)

The same is true here. Unless we know — and unless petitioners were adequately advised — what it means to "outrage public decency," the fact that they may have intended to outrage public decency, as they understood it, does not put any more definite content into the term.

We are thus left with a statute said to be purposely vague by the only courts which have ever had occasion to inquire into its purpose and with no guidlines of any kind concerning its intended application. It is proper to point out that here we have far more than a simple problem of determining whether given conduct falls on one side or the other of a reasonably defined prohibition. That problem is faced by courts and juries every day and is, in the nature of things, unavoidable.

whether it involves purely a question of fact, a mixed question, or one of law. Here we are faced with a far more basic question—did the Legislature intend to regulate manners, morals, or both, and if so, what is the applicable standard.[20] We have a statute which may truly mean all things to all men, for if it be said that public decency should not be defined by the standards of the most profligate segment of the community, neither could we accept the definitions of the most prudish. We have a statute which gives the executive almost unlimited power to harrass those with whose conduct or morals it is at odds or whom it suspects of having committed other crimes which cannot be proven.

Almost a century ago the Supreme Court said in *United States v. Reese,* 92 U.S. 214, 221: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." This thought was echoed by our own Supreme Court in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, 906: "The city attorney should not thus become an indirect censor of public reading matter; his abuse of such power could

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[20]We leave aside all questions of other possible constitutional prohibitions against regulation of mere manners or mere morals. Similarly, we are not concerned with policy considerations which are primarily within the competence of the Legislature. Nor, needless to add, do we take sides in the ancient and current controversy of the extent to which it is the business of the law to enforce morals. (See for example Devlin, The Enforcement of Morals, Oxford University Press (1965); Hart, *"Positivism and the Separation of Law and Morals"* 71 Harv. L.R. 593; Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart,* 71 Harv. L.R. 630.) It is worth noting however that one of the most articulate spokesmen for legal activism in the field of morals, Lord Devlin, has said: "Real crimes are sins with legal *definitions.*" (Devlin, "Law and Morals" (1961). Emphasis added.).

constitute an unlawful restraint upon the dissemination of literature not otherwise censorable." In his dissent in *Winters v. New York,* 333 U.S. 507, Justice Frankfurter, who disagreed with the majority's holding that the New York statute involved was unconstitutionally vague said, in distinguishing *Lanzetta v. New Jersey,* 306 U.S. 451: "Only a word needs to be said regarding *Lanzetta v. New Jersey,* 306 US 451. The case involved a New Jersey statute of the type that seeks to control 'vagrancy.' These statutes are in a class by themselves, in view of the familiar abuses to which they are put. See Note, 47 Col. L.Rev. 613, 625. Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of the police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." (*Ibid.,* p. 540.)

We most regretfully must hold that the portion of section 650½ involved in this proceeding is unconstitutional.[21]

Lastly, we deal with an argument not even advanced by respondent but which should be noted, namely the

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[21]We realize that in doing so we hold invalid a statute which at the present time appears to be used as an instrument of mercy rather than of harshness. Our own experience and scholarly research by others — see "The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County" 13 U.C.L.A. L.Rev. 643, 674, 772-775—tell us that more often than not, section 650½ is a section to which persons accused of sex crimes will plead guilty — or of which merciful judges will find them guilty—to avoid the stigma of registration under section 290 of the Penal Code.

question of petitioners "'standing" to raise the issue of vagueness.

In *Williams v. United States,* 341 U.S. 97, the defendant was denied standing to complain of vagueness because it was "as plain as a pikestaff" that to beat a confession out of a prisoner was to deprive him of his constitutional rights. The doctrine of "standing," is, of course, also recognized in this state. (*In re Cregler,* 56 Cal. 2d 308, 313.)

The problem of standing is a most difficult one and a reconciliation of all decisions may be impossible.[22] The Supreme Court of the United States has recognized that there have been "cases where this Court has not applied with perfect consistency these rules for avoiding unnecessary constitutional determinations . . ." (*United States v. Raines,* 362 U.S. 17, 24.) Exceptions to the rule permitting a person to attack a statute only on constitutional grounds applicable to himself have been recognized. Principally, where the application of a requirement of standing would have an inhibitory effect on freedom of speech, no showing of standing is required. (*Smith v. California,* 361 U.S. 147, 151; *Thornhill v. Alabama,* 310 U.S. 88, 96-99; *Fort v. Civil Service Commission,* 61 Cal. 2d 331, 339.)

We do not have to find that the conduct of petitioner Jeanne, aided and abetted by petitioner Harland, amounts to an exercise of their right to free speech. (*Cf. Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 502.) Nor—as is argued by them—do we say that Mrs. Davis was artistically expressing in the flesh what Botticelli

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[22]See the extensive discussion in *Amsterdam, op.cit.* 109 U.Pa. L.Rev. 67, 96-104.

put on canvas. Although, for reasons outlined in the footnote,[23] we have serious doubts whether petitioners have to show standing, we will assume in respondent's favor that they must. The argument would then be that since her conduct was such that whatever interpretation—even the most circumscribed—is given to section 650½, petitioners come so clearly within the proscription of the statute, that they need not be concerned with its shadowy boundaries. We disagree. While petitioners in their subsidiary arguments to the effect that they have not violated the statute, however it is interpreted, have taken positions which may appear untenable to some, we cannot say that in a society in which family magazines, which no one would think of hiding from the children, have for years played peek-a-boo with the female breast, it is "plain as a pikestaff" that a woman who exposes her bust for a brief period, without suggestive movements, before a limited group of adults of both sexes, outrages public decency by any and all definitions of that term.

It should not be necessary to add the following, but experience in how decisions of this nature are treated by casual readers compels us to: 1. Nothing we have said intimates that the Legislature, in a properly drawn

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[23]It may well be that petitioners can claim the protection of the rule applied in *Smith, Thornhill* and *Fort*. Even though it is probably fanciful to describe Mrs. Davis' performance as the exercise of her freedom to disseminate ideas, it is plain that section 650½ can be applied to matter protected by the First Amendment. Suppose a defendant is charged with violating section 311.2 of the Penal Code — distribution of obscene matter, which includes books, magazines, newspapers, etc.; suppose further that the prosecution cannot show that the matter is obscene and therefore outside of First Amendment protection. It could still contend that it outrages public decency. Since it is possible to make such use of section 650½, it seems very arguable that the *Smith—Thornhill — Fort* rule applies.

statute, cannot prohibit the conduct for which petitioners were convicted; 2. by the same token we have given no consideration whatever to any constitutional problems which would arise if the Legislature did so attempt; and 3. we are not taking judicial notice—as we have been urged to do—nor do we hold, based upon our own experience—as we have also been urged to do—that petitioners' conduct is today's norm and that the decisions of the trial judge and of the judges in the appellate department indicate that they adhered to a standard of conduct or morality which is outmoded.

The writ is granted; the convictions in cases M-32314 and M-32315 in the Municipal Court of the Inglewood Judicial District, County of Los Angeles, State of California are set aside and petitioners are discharged from all restraints, actual, constructive or threatened by virtue of said convictions.

Kaus, *J.*

We concur:
Shinn, *P. J.*
Ford, *J.*

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IN THE

Supreme Court of the United States

October Term, 1965

No. 991

PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Motion to Dismiss and Argument and Points and Authorities in Support Thereof.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 991

PETER WYLAN,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS.

Appellant's Petition for Rehearing, on Appeal From the Appellate Department of the Superior Court for the County of Los Angeles, State of California.

Appellee respectfully requests this Court to dismiss Appellant's Petition for Rehearing from its *per curiam* decision, dated May 23, 1966, dismissing his appeal on the ground of want of jurisdiction. This motion is based upon the belief that the recent ruling of the California District Court of Appeal, Second District, in the case of *In re Davis*, Criminal No. 11822, reversing the Appellate Department of the Superior Court, County of Los Angeles, State of California, is in direct conflict with the views of the California Supreme Court on the same phrase and prohibition of the same statute, and therefore, itself subject to reversal by that court.

It is true that a department of the California District Court of Appeal, Second District, has reversed the Appellate Department of the Superior Court, Los Angeles County, in the *Davis* case which is the subject of Appellant's Petition for Rehearing. It is alleged also to be true that Respondent in that case is in the process of perfecting an appeal from that decision. In the interim, we propose to be guided by the expressed view of the California Supreme Court *in re* Section 650½ of the Penal Code of the State of California.

ARGUMENT AND POINTS AND AUTHORITIES.

I.

The California Supreme Court Has Accepted the Specific Portion of Penal Code 650½ Which Is the Subject of This Appeal as Valid and Directed at Sexual Matters in the Criminal Law.

In those recent cases in which the California Supreme Court declared it unconstitutional for cities and counties to enact local ordinances for the control of prostitution and sexual promiscuity, the justices reviewed all of the State Penal Code Sections considered pertinent and applicable, analyzed and listed those which dealt with the criminal aspects of sex, indecent exposure, and obscene exhibitions, and concluded that the State Legislature had occupied the field.

One of those state statutes, Penal Code Sec. 650½, and more particularly the very wording under consideration here, was repeatedly accorded a position of prominence in the reasoning and discussion of the court:

I quote from *In re Moss* (July, 1962), 58 Cal. 2d 117, 373 P. 2d 425, at page 119:

> "Section 650½ of the Penal Code now provides, and provided at the time of the commission of the alleged offense, in part: 'A person who wilfully and wrongfully commits any act . . . *which openly outrages public decency* . . . is guilty of a misdemeanor.' (Emphasis ours.)

The Supreme Court then states:

> "A reading of the above quoted sections of the Penal Code shows clearly that the state had occupied the field with regard to the criminal as-

> pects of indecent exposure and obscene exhibitions. Accordingly, a city ordinance attempting to make certain acts of exposure and exhibition criminal is in conflict with the state law and is void."

Certainly the District Court of Appeal is not now asking us to believe that the Justices of the Supreme Court rendered a decision of such grave and far reaching consequences to the people of this most populous state without determining the validity of the statutes they quoted and relied upon to deprive the political subdivisions of their traditional police power in the field of sexual promiscuity. A void statute would be no statute at all. It must follow then that if the state law were indeed unconstitutional the Supreme Court was in error in its conclusion that local ordinances "in conflict therewith were void." We cannot accept this indictment of that high court.

Pursuing the point even further, Justice White, in a concurring opinion, stressed the careful consideration given the entire matter by the justices. I quote from page 120 of the *Moss* case, cited *supra:*

> "However, in the case now before us, I am satisfied that by the very language of subdivision 2 of Penal Code Sec. 314, making it unlawful for any person '. . . to make any other exhibition of himself to public view or the view of any number of persons, *such as is offensive to decency,* or is adapted to excite to vicious or lewd thoughts or acts . . .' 'and in section 650½ of the Penal Code making it a misdemeanor for any person to com-

> mit any act . . . *which openly outrages public decency* . . .' the Legislature has manifested a clear intention to occupy in its entirety the field in which the City of Los Angeles sought to legislate." (Emphasis ours.)

Nor can it be overlooked that he concludes with this statement:

> "We are not here confronted with an ordinance which involves new and additional regulations in aid and furtherance of the general law, as did the ordinance under consideration in the case of In re Lane, but with an ordinance which punishes exactly the same act denounced by a state law. It is, consequently, in conflict therewith and therefore, to that extent, void. (*In re Mingo*, 190 Cal. 769, 771; 214 P. 850."

How could an ordinance be "in conflict therewith and therefore void" if the statute itself were void?

Let us examine the *Lane* Case. Certainly it cannot be overlooked that in that landmark case in the field of sexual promiscuity, *In re Lane* (June, 1962), 58 Cal. 2d 99; 372 P. 2d 897, the California Supreme Court studied and analyzed with meticulous care and in great detail, and commented upon and listed as valid a vast number of state statutes dealing with the various aspects of criminal law control of sexual activity and obscene and indecent activity in direct relation thereto, in depriving cities and counties of their historical police authority in the field. And there again, the challenged

wording of Penal Code Section 650½ is given a place of prominence:

I quote from page 103, of the *Lane* case:

". . . and 650½ (*acts against public decency*) . . ."

And again from page 104:

". . . (See, e.g. Penal Code Sec. 647, subds. (a), (d)) (Lewd or dissolute conduct in a public place); sec. 314 (indecent exposure and obscene exhibitions); and *sec. 650½ (acts against public decency)*" (Emphasis ours.)

In re Lane is a landmark case in this state, and it could not have been the result of indifferent analysis of the statutes involved. No less than seventy County Counsels, District Attorneys, City Attorneys, and the Attorney General of the State appeared *Amici Curiae* on behalf of the Respondent (City of Los Angeles).

In that case the Supreme Court held:

"A local municipal ordinance is invalid if it attempts to impose *additional requirements* in a field that is preempted by the general law." (Emphasis ours.)

If Sec. 650½, "*which openly outrages public decency*" is indeed void for uncertainty, then Penal Code Section 314, subd. 2, ("*such as is offensive to decency*") is void for the same reason, and thus a substantial portion of the state law upon which the *Lane* decision rests is void. How then can it be said that the ordinance was invalid because it attempted to impose *additional requirements*?

II.

Section 650½, "Which Openly Outrages Public Decency", Is Not Vague and Uncertain as to Its Purpose, but Is Specifically Directed at the Control and Regulation of the Criminal Aspects of Sexual Activity Not Otherwise Specifically Made Punishable by Other Penal Code Sections.

I quote from Chief Justice Gibson's separate concurring opinion in the *Lane* case. At page 110:

> "The analysis made in Justice McComb's opinion of the Penal Code provisions *relating to the criminal aspects of sexual intercourse* demonstrates that the Legislature has established a comprehensive general scheme *with respect to this subject* and has occupied the entire field." (Emphasis ours.)

How, in the face of these clear pronouncements as to the unmistakable purpose of the Legislature in enacting the challenged wording of Penal Code Section 650½, by the highest court of the State, could the lesser appellate court profess ignorance and confusion as to its meaning? We can only conclude that they became momentarily lost in the fascinating game of intellectual roulette.

As if to make its position even more clear, in an even later case than *Moss* or *Lane,* the California Supreme Court has considered again, and accepted the validity of, and the meaning and purpose of that portion of Penal Code Section 650½ under attack by appellant in this petition. I refer to *Whitney v. Municipal Court* (Dec. 1962), 58 Cal. 2d 907, 377 P. 2d 80 at page 910:

> "Section 650½ of the Penal Code now provides, and provided at the time of the commission of the

alleged offense, in part: 'A person who wilfully and wrongfully commits any act . . . *which openly outrages public decency* . . . is guilty of a misdemeanor.' 'A reading of the above quoted sections of the Penal Code *shows clearly* that the state had occupied the field *with regard to the criminal aspects of obscene exhibitions.*'" (Emphasis ours.)

III.

The California Supreme Court Occupies a Position of Appellate Authority Over All of the Other Courts Within the State, Including the Various Branches of the State District Court of Appeal.

Rule 28, California Appellate Rules. Hearing in Supreme Court:

"(a) Time within which court may grant hearing. Within 30 days after a decision of a District Court of Appeal becomes final as to that court, the Supreme Court, on its own motion, or on petition as provided in subdivision (b) may order the cause transferred to itself for hearing and decision, and . . ."

Rule 29: Grounds for Hearing in the Supreme Court:

"(a) Grounds. A hearing in the Supreme Court after decision by a District Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decisions or the settlement of important questions of law, (2) where the District Court of Appeal was without jurisdiction of the cause; . . ."

IV.

We Believe the District Court of Appeal Should Have Drawn a Distinction Between Statutory Unconstitutionality, and the Unconstitutional Application of the Statute, Since in This Manner Only Can True Justice Ever Be Attained.

To declare a statute unconstitutional and void because one disapproves of its application in an isolated situation is to abandon the search for truth in the administration of justice. If the statute itself must stand or fall because in a given case one disapproves of the result, rather than the result itself being set aside as an unconstitutional application of an otherwise valid statute then invariably the guilty must repeatedly go free or the innocent suffer, according to the views of a particular court.

If such a judicial philosophy is permanently pursued it cannot help but result in an abandonment of the only worthwhile concept of justice under the law: The ascertainment of truth; the protection of the innocent; and the punishment of guilt.

With no intent to be disrespectful, it may indeed be that the District Court of Appeal in the *Davis* case rather than a failure to understand the wording of Section 650½, found its application incompatible with the facts. Men hold many views regarding the upper feminine torso. Some of them are artistic, some practical, some idealistic, and some are related to sexuality, but none of them encompass the obscene or indecent.

This, however, is not the case in the factual situation in Appellant's conduct, which did indeed outrage public decency, as prohibited by the legislature and defined by the California Supreme Court.

V.

Section 650½ of the California Penal Code, and More Particularly, the Prohibition Here Under Consideration, Is Not Vague and Uncertain Within the Judicial Holdings Pertaining to That Area of Statutory Interpretation, and Should Not Be Construed as Void.

> "A statute cannot be held void for uncertainty if any reasonable and practical construction can be given it. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible to different interpretations, will not justify the courts in disregarding it. It is the duty of the courts to endeavor by every rule of construction to ascertain the meaning of, and give full force and effect to, every enactment of the legislature not obnoxious to constitutional prohibitions." *State ex rel. Crow v. West Side R. Co.*, 146 Mo. 159, 47 S.W. 959.

This case is cited in the extensive annotation of *Connally v. General Construction Co.*, 269 U.S. 385, which in turn is one of the authorities relied upon by the District Court of Appeal (California) in the *Davis* case. The *Connally* case, incidentally, on its facts and type of statute involved, can have little comparative value in either the *Davis* or the instant case. It is, however, of great value because of its exhaustive consideration of cases in the field of statutory uncertainty.

> "A court will not nullify an enactment of the legislature because the language used is indefinite in some particular, if the purpose or intent of the Legislature can be ascertained." *Hunt v. State*, 195 Ind. 585; 146 N.E. 329.

We respectfully submit that the District Court of Appeal, California, Second District, could very easily have ascertained both the purpose and the intent of the Legislature in enacting Section 650½ of the Penal Code of this state. The Supreme Court had in fact, already resolved the matter for them.

Justice Sutherland says, at page 329, of the *Connally* case:

> ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. *The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.*" (Emphasis ours.)

Certainly it is glaringly apparent that Section 650½ of the California Penal Code meets that test. The District Court of Appeal, in the *Davis* case, stipulates that the Appellants there not only knew of their prohibited conduct, but were irate because they were deprived of the publicity value of an actual arrest.

In the case before us here, one would have to be naive indeed, to take the position that Appellant did not know and could not be expected to know that his particular reprehensible conduct was an outrage to public decency, within the criminal aspects of sexual activity, obscenity, and exhibitionism, and immorality of the most flagrant sort, as defined by the California Supreme Court *in re* Section 650½ in the cases heretofore cited and discussed.

VI.

Conclusion.

We have deliberately refrained from any attempt to discredit the interpretation of the cases cited and the law relied upon in the *Davis* case by the District Court of Appeal. We do not wish to appear to challenge either the authority (within its legal limits) of that court, nor the wisdom of its justices. We simply feel it our duty to point out that it is a tribunal of secondary appellate authority within the state of California, and that we are advised positively by the attorney for the Respondent in the *Davis* case that he is at this moment preparing his brief on appeal to the California Supreme Court.

We believe further, from the cases already decided by that court that the probability of reversal of the District Court of Appeal in the *Davis* case should not be overlooked.

It appears to us that the District Court of Appeal, in its conclusion that Penal Code Section 650½, "openly outrages public decency" is unconstitutional for uncertainty, failed to consider and be guided by the views of the higher court.

We submit therefore, that the matter of constitutionality of Section 650½ of the California Penal Code should be left to the determination of the California Supreme Court, and we earnestly petition this Court to dismiss the petition of Appellant.

Respectfully submitted,

BYRON B. GENTRY,
Attorney for Appellee.

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